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No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1946

EDNA W. BALLARD AND DONALD BALLARD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The original opinion of the circuit court of appeals on the remand of this case by this Court, 322 U. S. 78 (R. 1642–1643), is not reported. The majority and dissenting opinions on denial of a petition for rehearing (R. 1645–1673) are reported at 152 F. 2d 941.

JURISDICTION

The judgment of the circuit court of appeals was entered June 29, 1945 (R. 1643), and a petition for rehearing was denied December 26, 1945

(R. 1644). The petition for a writ of certiorari was filed January 28, 1946, and granted March 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether persons who devise a scheme to defraud by propagating purported religious doctrines in which they themselves do not believe are protected by the First Amendment from prosecution for mail fraud.

2. Whether the indictment was sufficient to support the theory on which the case was tried under the judge's instruction, and whether that instruction resulted in a fatal amendment of the indictment.

3. Whether the prosecutor was guilty of prejudicial misconduct.

4. Whether the exclusion of women from the panel of grand and petit jurors requires reversal of petitioners' conviction and dismissal of the indictment.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or

> for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of California under several counts of an indictment charging them and others with using and conspiring to use the mails in execution of a scheme to defraud through a purported religious organization known as the "I Am" movement. (R. 2–63,

170–171). Edna Ballard was sentenced to imprisonment for one year and to pay fines totaling $8,000, and Donald Ballard was sentenced to imprisonment for 30 days and to pay fines totaling $400. Both prison sentences were suspended and petitioners were placed on probation for one year. (R. 180–182.)

The scheme to defraud set forth in the indictment charged that the defendants and Guy W. Ballard (who died before the indictment was returned) organized a purported religious organization known as the "I Am" movement, and in connection therewith formed and dominated two corporations known as the St. Germain Foundation and the St. Germain Press, established branch offices and meeting rooms in various cities, and arranged a number of radio programs; that as a means of inducing their followers to purchase books, charts, pamphlets, etc., and to make donations to defendants and the organizations controlled by them, defendants made a number of false and fraudulent representations which they knew to be false and which were made with intent to deceive. Among the misrepresentations charged in the indictment were claims that Guy W. Ballard had attained a supernatural state of immortality; that all the Ballards had been selected as divine messengers through whom the teachings of St. Germain and other "ascended masters" would be communicated to mankind;

that the Ballards had the power to conquer disease, death, old age, poverty, and misery; that they could cure and had cured persons of physical ailments; that they had the power to precipitate from the air, money and other material riches; that they had received divine visitations from St. Germain and other supernatural entities who dictated the books published by defendants; that the Ballards had actually encountered the experiences related in the books of the movement; that St. Germain had appeared in person before Charles Sindelar who painted the saint's portrait; that books, charts, and phonograph records issued by defendants had special salutary qualities which would be transmitted to purchasers; and that since a cataclysm was about to engulf the earth, it was wiser to give money to defendants than to invest it in banks, homes, insurances, etc. (R. 2–22.)

A demurrer attacking the indictment as an infringement of the First Amendment (R. 64–77) and a motion to quash on the same ground (R. 77–109, 113–144) and on the ground that women had been systematically excluded from the grand jury panel (R. 109–110, 145) were overruled (R. 149). However, early in the trial, and subsequently in submitting the case to the jury, the trial judge instructed them that the truth or falsity of petitioner's representations of religious belief was not an issue for their determination but

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that petitioners could be found guilty if they perpetrated a scheme to defraud by preaching doctrines which they did not honestly believe (R. 402–404, 1575–1577; see also R. 1571–1572, 1588–1590).

On appeal to the Circuit Court of Appeals for the Ninth Circuit, the convictions were reversed on the ground that the trial judge had erred in so instructing the jury. 138 F. 2d 540. This Court granted certiorari, 320 U. S. 733, and subsequently held that the court below was in error in holding that the truth or falsity of petitioners' representations of religious belief should have been submitted to the jury. It reversed the judgment of the circuit court of appeals and remanded the cause for consideration of other issues raised by petitioners. 322 U. S. 78.

On the remand a majority of the circuit court of appeals affirmed the judgment of conviction without discussion of the issues raised (R. 1642–1643), Judge Denman dissenting in an opinion which was subsequently withdrawn (R. 1642, 1644). A petition for rehearing was filed, and on denial of that petition the majority wrote an additional opinion (R. 1645–1649), Judge Denman again dissenting (R. 1650–1673).

The evidence for the Government may be summarized as follows:

In 1930, at Mt. Shasta, California, Guy W. Ballard wrote a book called "Unveiled Mysteries"

which purported to relate his true experiences (R. 257, 417, 507, 614, 757–758). It was first published and offered for sale in 1934 (R. 242). For approximately two years before that time, Guy W. Ballard and his wife, Edna Ballard, had been conducting classes in Chicago at which they read portions of the manuscript of "Unveiled Mysteries" and of a second book called "The Magic Presence" (R. 242, 427–430, 475, 553). In the fall of 1934 the Ballards engaged Harry Sieber to act as their business manager and agreed to give him a percentage of the amount received from the sale of the books (R. 271, 274, 285–287, 291). Arrangements were made to have the Ballards conduct classes in various cities at which the disciples would understand that "love gifts" to the "messengers" would be acceptable, the proceeds of such gifts to be divided equally between the Ballards and Sieber (R. 273–274, 278–279, 291). The tour was a financial success, each class resulting in gifts totaling approximately $1,000 (R. 295–296).

Thereafter, the "I Am" movement grew rapidly. Disciples were appointed "messengers" and given authority to conduct classes and reading rooms in various cities (R. 431–433, 435–437, 487–489, 755, 765–766). The local groups operated independently but purchased books, charts, records, etc., from the St. Germain Press, a business corporation wholly owned by the Ballards

(R. 240, 436, 584, 615, 755–756, 762–766). The Ballards themselves conducted a number of classes in various cities at which autographed books were sold and substantial love offerings received (R. 561–562, 616, 632, 767). At one of the classes conducted in Los Angeles between July 1 and July 17, 1938, the receipts totaled $27,796.22 of which $12,454.75 represented love gifts (Ex. 142, R. 562). At another class conducted from June 30 to July 16, 1939, receipts totaled $17,613.36 of which $9,435.15 consisted of love gifts (Ex. 142, R. 562). By 1940 the publications consisted of seven volumes published by the St. Germain Press (R. 234, 241–242, 553) and a magazine called "The Voice of the I Am" published by a follower of the movement (R. 1058). Each student was urged to buy his own set of books and to refrain from lending his copies to others, as the radiation of another person would lessen the beneficent effect (R. 400, 510, 614–615). The radio was used extensively, approximately $190,000 being spent for radio advertising (R. 253–254, 645–646). Records for radio transcriptions were sold to the local groups, who assumed responsibility for the sponsoring of broadcasts (R. 437, 448–449, 646–647, 654–655, 666–668, 679, 684, 759). Phonograph records, advertised as having a special healing quality because of their blue color, and a painting, represented as the perfect likeness of St. Germain as he appeared to the Ballards and to

the artist, Sindelar, were offered for sale (R. 349, 352, 354, 590, 644, 647). The Ballards engaged in extensive correspondence with persons throughout the country, receiving between 25 and 50 letters a day (R. 538). About one-fourth of the letters enclosed money as love gifts (R. 538).

Among the representations of the movement were the following:

Divine Visitations.—St. Germain and Jesus had appeared before the Ballards in tangible form, so that they could shake hands (R. 243, 257, 262, 398–399, 596, 737–738, 757–758). St. Germain and other "ascended masters" dictated the published discourses of the movement (R. 254–255, 507–508, 614). These masters would appear before group meetings in their tangible form (R. 398–399, 506, 570).

Healing.—The invocation of the great "I Am Presence" would cure diseases considered incurable by medical science (R. 249–250, 258, 260, 264, 394, 405–406, 443–444, 457). Songs written by a follower of the movement were advertised as possessing healing qualities (R. 490–491, Ex. 39, pp. 35–36; Ex. 43, p. 48). Thousands of people had been cured in this manner (R. 249–250, 258, 406, 444, 572).

Ascension.—Until 1938, the Ballards taught that human beings would ascend in their physical body; that this could be accomplished before death; that the ascended person could thereafter

return to earth (R. 433–435, 509–510, 569, 628–629, 713); and that Ballard himself had made the ascension and had been purified (R. 755). Late in 1938 a new dispensation was announced by which it was proclaimed that the physical body would remain on earth but that the etheric body would ascend (R. 443; see R. 938, 978).[1]

Precipitation.—Persons who adhered to the teachings of the movement would be able to precipitate from the air gold, jewels, and other material needs. The sparkles of light that one saw in the sunlight were the elements from which the desired substances would be precipitated. (R. 397, 450, 476–477, 715, 761.) One of the discourses explained to the students how "money may be precipitated without interfering with the government allotment" (R. 482–484, later printed in Ex. 5, pp. 118–120).

Cataclysm.—A cataclysm was soon to engulf the earth but the followers of the "I Am" movement would be saved (R. 401, 409, 445, 507, 854). In fact, the presence of the Ballards had saved San Francisco from destruction (R. 401–402, 588, 854).

Among the factors bearing on the issue of petitioners' good faith are the following:

Commercialism.—A commercial spirit permeated the activities. Early in the history of

[1] Guy W. Ballard died in December 1939 (R. 533, 743–744).

the movement Mr. Ballard wrote to Sieber, his business manager (Exhibit 73, R. 286–287):

> Harry, I am the channel that has made all this possible and I do not intend to be swallowed up by this terrible commercial thing that has always forgotten the originator of a thing from which others have received millions.
>
> * * * * *
>
> We want to spread this work more than anyone but it is not necessary to make ourselves financially helpless in order to do so. Saint Germain said in the beginning that if we would set our decree and stick to it to pay 30 and 33⅓% and back it up with the "I Am" all would come to it who would be of help.

In another letter (Exhibit 74, R. 288–289) he wrote:

> You are right. There must be a definite policy to act under in regard to the books. We do want to get the books out as soon as possible but not at a complete financial sacrifice. Humanity has gone this far and I doubt not will stick around a while longer.[2]

According to letters introduced in evidence, St. Germain was concerned with such financial details

[2] Compare with this statement representations that a cataclysm was about to engulf the earth (R. 401, 409, 445, 507, 854).

as a 33⅓% limit on the discount for books (R. 285–287, 305), the manner of selling the picture (R. 354), and the sponsorship of radio programs (R. 684, 689, 692–693). The Ballards were careful to prevent the wholesale book business from slipping out of their hands (R. 306–307, 330–331). If there was an oversupply of one book its sale was stressed above the others (R. 368, 709). The publication of a new book of songs was announced as an important message from "the great harmony" (R. 587–589). Shortly after Mr. Ballard's death, his photograph was offered for sale at prices ranging from $2.50 to $25.00 (Exs. 57, 58, p. 35). Credit was sparingly extended in the sale of books and radio transcriptions (R. 297, 654–655). The Ballards were dissatisfied when receipts from love gifts at classes were not large (R. 368, 571, 723, 759) and reported to the staff that St. Germain had directed the students not to go to places where they could not make expenses (R. 563). The copyrights for the books, records, charts, etc., were held by the St. Germain Press, the Ballards' business corporation (R. 240).[3] Mrs. Ballard and Donald Ballard had no source of income other than the "I Am" activity (R.

[3] A list of the publications, records, etc., sold by the St. Germain Press appeared in the back pages of each issue of "The Voice of the I Am" together with an announcement that the copyright was held exclusively by the St. Germain Press and the Ballards (see Exs. 10–67, 196–199).

875, 879, 1080, 1140). Their scale of living was such that, when Donald was only 18, he was given $11,000 in five months (R. 598).

Books and discourses.—The books and discourses purporting to be dictations from the ascended masters were elaborated upon and revised (R. 429–430, 475, 557–560). When a secretary stated that she could not understand why changes in the dictation were necessary, Mrs. Ballard ended the conversation rather abruptly with a statement to the effect that the discourses could not go out the way they were (R. 559–560). Factual errors in the book "The Magic Presence," such as listing the ports of call in India in the wrong order, were called to the attention of the Ballards and were corrected (R. 345–346, 359).

The foreword of the book "The Magic Presence" contains the following statement:

> The retreats, people, and instruments which I saw and associated with while with the Ascended Masters are real physical places and things and tangible living breathing beings. They were not imaginary or symbolic and are not to be interpreted in any such way. (R. 757–758; Ex. 4, xii.)

The book recounts alleged experiences of Guy W. Ballard in Europe and in Asia over a period of several years beginning in 1931 (Ex. 4, p. 132), replete with such details as the fact that he took

a taxi (p. 226); that considerable tipping was required to secure passage on a steamship (pp. 226–227); that he sailed on the S. S. *Majestic* which was escorted out to sea by tugboats (p. 297); that his boat docked at Cherbourg (p. 310); that he visited the Louvre (p. 311) and drove to Marseilles by car (p. 312); that he was taken to "a private hostelry, quaint but spotlessly clean" (p. 313); that he spoke to an old vendor of jewels in Alexandria (p. 315); and that he rode on a small mountain pony in India (p. 370). Numerous witnesses, both for the prosecution and for the defense, testified that they believed in the truth of the narrative portions of the book and that such belief induced them to buy the book and join the movement (R. 408, 640, 757, 942, 958, 962, 986, 1045, 1087, 1102). During the years from 1931 to 1934 the Ballards were in fact living in Chicago (R. 553).

Healing.—Petitioners' represented, not only that they could cure, but that they had cured numerous persons of serious physical ailments by invocation of the I Am Presence. (See *supra*, p. 9). Mrs. Ballard frequently stated from the platform that they had cured people suffering from cancer (R. 572), and Mr. Ballard said that a woman with a cancerous growth in her throat came to him and that in his presence this cancerous growth dropped down in her throat and

disappeared (R. 406).[4] Nevertheless, Mr. Ballard's secretary, who was with him constantly, never heard anyone say he had been cured of cancer (R. 572). Two former followers of the movement testified that they had not observed any healings accomplished at the call of the messengers (R. 406, 457, 465).

The Ballards themselves resorted to common medication (R. 332, 489, 534–536). Requests for healing advice were answered by form letters and subordinates were told to "say the usual thing" in reply (R. 368–369, 420, 540, 548–549).

The blue phonograph records alleged to have a special healing radiation as the result of long preparation (R. 590) were prepared by the manufacturer without receiving a formula from the Ballards, and the final product was chosen from among several samples submitted to the Ballards (R. 645–647).

Photograph of St. Germain.—Before 1935, the Ballards used as the picture of St. Germain a photograph of a painting in which scrolls and an ancient script were employed as decoration. The

[4] See also Exhibit 10, the February 1936 issue of the "Voice of the I Am," p. 23: "In Long Beach countless healings took place during the lectures"; Exhibit 47, pp. 7–8, "The Mighty Victory's Discourse": "There are thousands of people who have been healed at one call of the messengers"; Exhibit 55, p. 12: "The healing that takes place at their [the messengers'] call every hour of the day, week after week, and month after month, is unparalleled on earth."

photograph appeared in early editions of the book "Unveiled Mysteries" (Ex. 3; see R. 1063). The picture had been painted in about 1923 by Theresa de Carranza, and a photograph thereof was in Mr. Ballard's possession in 1930 (R. 836–837, 841, 1068–1070). The artist who painted the picture which was subsequently advertised as the result of a revelation by St. Germain (R. 349)[5] testified that his painting was the result of a mental impression, that he had previously seen the picture appearing in "Unveiled Mysteries" and that the scrolls and script were copied from the photograph in the book (R. 1061–1064).

Miscellaneous evidence.—In 1937 one of the members of the Ballards' staff had a flashlight which was known as Ray-O-Light. Mrs. Ballard said that she believed that there must be an ascended master by that name, and a day later one of the discourses was published as that by the ascended master Ray-O-Light. (R. 560–561.)

In 1936 a chiropractor who had treated Mr. Ballard (R. 466) told him that all humans had electromagnetic energy in the body and could

[5] Government's Exhibit 97 (R. 349), a circular advertising the painting, read as follows:

"The picture which Mr. Sindelar has painted of St. Germain is an absolute perfect likeness of him as we have seen him many times in the tangible body.

"St. Germain revealed himself to Mr. Sindelar previous to and while he was painting St. Germain's likeness and he has said that it was splendid."

send an electric current through the ends of their finger tips across the heads of an audience. A short time afterwards Mr. Ballard told his class that St. Germain had taught him many marvelous laws and that he was sending an electrical charge from his fingers that the audience could feel through their brain (R. 468–469).

Mrs. Ballard stated to a witness that she had received a precipitated jewel which she showed him (R. 363) but on the stand she testified that she had merely condensed points of light into a solid which she held in her hand for a period of approximately twenty minutes (R. 1148).

A follower of the movement told Mrs. Ballard that she found it difficult to spread the work because people would not accept the spectacular and sensational. Mrs. Ballard replied that the spectacular and sensational drew the crowds and that the larger the crowds the greater the income (R. 710–711).

An article published in the Voice magazine for September 1937 stated that Mrs. Ballard, her husband, and Donald had stood in the visible presence of St. Germain many times (R. 1129–1130; Ex. 29, p. 23). Donald himself, in a deposition in his divorce proceeding in 1940, testified that he had no experiences with the ascended master St. Germain (R. 874, 878).

On several occasions Donald Ballard stated that the movement was "bunk" and that he would like

to expose the work as a "fake" (R. 335, 573–574, 595, 613).

SUMMARY OF ARGUMENT

1. The First Amendment to the Constitution was not infringed by the trial court's instruction allowing the jury to convict petitioners if it found that they used the mails to defraud by propagating religious doctrines which they themselves did not believe. The First Amendment guarantees the right to believe, not the right to pretend that one believes. The argument that a trial on the issue of good faith belief will so inevitably involve a judgment on the credibility of doctrines that it must necessarily infringe upon the right to believe is, we submit, too categorical. In many instances, other than those touching upon religion, proof of bad faith does not necessarily depend upon falsity. In this very case, the success of the movement and the testimony of various witnesses made it abundantly clear that petitioners' views, however unorthodox, were believable. Other evidence in case, not relating to the nature of the beliefs themselves, was amply sufficient to justify the conclusion that petitioners were propagating those beliefs in bad faith for the purpose of despoiling the public.

There is no real danger that a prosecution for lack of belief will be used against innocent persons who may have less than a full belief in a professed credo. The crime condemned by the statute

is not the mere lack of belief or solicitation of money without belief, but solicitation without belief under such circumstances that it amounts to an intentional effort to despoil the public, i. e., a scheme to defraud. The absence of a fixed line of demarcation between guilt and innocence is not a ground for barring prosecution of those who are clearly guilty. Cf. *Robinson* v. *United States,* 324 U. S. 282, 286.

2. A mere reading of the indictment refutes petitioners' contention that it failed adequately to allege lack of belief. The allegations of paragraphs 1 to 18 that petitioners "well knew" that their representations were false and the general allegations of paragraphs 19 and 20 that the representations were made with intent to deceive clearly put petitioners on notice that their good faith was an issue to be determined by the jury.

The mere fact that the indictment contained allegations which, under the prior decision of this Court, could not be submitted to the jury does not require dismissal of the indictment. Such allegations may be treated as surplusage and disregarded. *Ford* v. *United States,* 273 U. S. 593, 602.

Since the indictment charged both falsity and lack of good faith belief in the representations made, the action of the trial judge in withdrawing the issue of falsity was merely the rejection of one of the two alleged methods of committing

the offense. As such, it did not constitute an improper amendment of the indictment. *Salinger* v. *United States*, 272 U. S. 542, 548–549.

3. The only remarks of government counsel which we think may properly be subject to criticism are those in which they called for definite proof of petitioners' miraculous claims. While such statements were improper as going beyond the theory on which the case was tried, we think that, judged in the light of all the circumstances of this case, they do not constitute reversible error.

The passages attacked as improper, read alone, appear much more significant than they do in their context. They were only minor parts of very long summations and were no more flamboyant than many other sections of the summations to which no objection can be made. Trial counsel did not object to the portions of the summations now under attack, and the district judge cautioned the jury to disregard extreme or extraordinary statements. Throughout the trial the jury had constantly been told that the truth or falsity of religious beliefs was not an issue for their determination, a caution which was reiterated several times in the judge's charge. The evidence in this case was very strong. Hence, under all the circumstances, the few statements of counsel that may be considered as going beyond the underlying theory of the case could not have

misled the jury, and should not be considered prejudicial.

4. The exclusion of women from the panel of grand and petit juries, although they were qualified for service under state law, does not necessitate dismissal of the indictment or reversal of petitioners' convictions. The practice, although improper, did not affect any of petitioners' constitutional rights, did not limit the jury to a particular economic class, and did not actually prejudice petitioners.

The exclusion of women imposed by practice in the district court for southern California at the time the indictment was returned is still imposed by law in nineteen states of the Union, and challenges to the disqualification of women as a violation of the Nineteenth Amendment or the due process and equal protection clauses of the Fourteenth Amendment have been consistently denied. The absence of constitutional limitations distinguishes this case from those involving discrimination against a particular race.

Discrimination because of sex does not fall within the scope of the recent decision of this Court in *Thiel* v. *Southern Pacific Co.*, No. 349, O. T. 1945, decided May 20, 1946, for limitation of the jury to members of a particular sex does not tend to load a jury with persons likely to have a similar outlook.

No prejudice can be inferred from the mere

fact that one of the defendants is a woman. Nor can it be shown that women are more religiously inclined than men.

ARGUMENT

I

SINCE THE FIRST AMENDMENT PROTECTS RELIGIOUS BELIEF AND NOT FRAUD PERPETRATED UNDER THE GUISE OF BELIEF, THE PROSECUTION DID NOT INFRINGE UPON RELIGIOUS LIBERTY

The most fundamental question in this case is the constitutionality of the theory on which the case was tried, i. e., whether the absolute freedom of religious belief guaranteed by the First Amendment was violated by allowing the jury to find petitioners guilty if they used the mails in execution of a scheme to defraud by propagating purported religious doctrines which they themselves did not believe.

In the abstract, a prosecution on such a theory presents no constitutional difficulties. The First Amendment guarantees the right to believe, not the right to pretend that one believes. It is clear that one who has no belief is not injured in his right to believe when he is prosecuted for falsely pretending that he does believe. Mr. Justice Jackson, who previously voted to dismiss this indictment, recognized that religious leaders could properly be convicted for making fraudulent representations on matters other than faith or experience. 322 U. S. at page 95. We think the

same principle would necessarily apply if purported religious leaders made fraudulent representations of fact even as to matters which are in the nature of religious principles. Thus, if persons, in order to obtain money for themselves by a purported religious movement, represented that they had in their actual physical possession a lump of gold precipitated from the air, whereas it was shown that they had obtained the gold by melting down some old jewelry, we do not believe a prosecution for fraud could be attacked on constitutional grounds. See dissenting opinion of the late Chief Justice, 322 U. S. at page 89. Logically, there is no essential difference where the issue of fact tried by the jury is the fact of a defendant's lack of belief. As this Court stated in *Seven Cases* v. *United States*, 239 U. S. 510, 517–518, "state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it." In *Knauer* v. *United States*, No. 510, O. T. 1945, decided June 10, 1946, this Court held that misrepresentation of a state of mind—intent to be loyal to this country—constituted such fraud as would justify cancellation of a certificate of naturalization. Misrepresentation of belief is, therefore, a fraud, and, as such, it is not conduct protected by the Constitution. Our concept of religious freedom, broad as it is, does not protect conduct violative of a general criminal statute

enacted for the protection of the morals, health, and general welfare of the community. *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Davis* v. *Beason*, 133 U. S. 333; *Reynolds* v. *United States*, 98 U. S. 145, 166.

The attack on the constitutionality of this proceeding, articulated in the dissenting opinion of Mr. Justice Jackson (322 U. S. at p. 92), is based, not on its logical invalidity, but on practical considerations of policy; on the apprehension that a trial for lack of belief will so inevitably involve a judgment on the believability of professed doctrines that it must result in the infringement of the right of innocent persons to entertain unorthodox views. That danger is thought to be so great that this Court must hold that never, under any circumstances, can a person be tried for misrepresenting his beliefs.

We submit that the position advocated by Mr. Justice Jackson and adopted by petitioners is too categorical. Proof of lack of belief does not necessarily depend upon proof of falsity. A person who has devised and utilized a purported religious movement may make direct admissions that he had no belief in the doctrines which he preached and that he had started the movement merely as a means of obtaining money from the credulous. The proof in this case, as to Donald Ballard at least, is almost that strong, for there was evidence that on a number of occasions

Donald had characterized the "I Am" movement as "bunk" and a "fake." (See Statement, *supra*, pp. 17–18.) We do not think that the possibility that in some other case the evidence may not be so strong requires this Court now to lay down an absolute rule which would require that such a person be forever free to use the United States mails with impunity in furtherance of his fraud.

Direct admissions are not the only way in which bad faith may be established without reaching the question of ultimate verity. In situations unconnected with religion, proof of bad faith does not always turn on proof of falsity. For example, the Securities and Exchange Commission, in considering representations as to ore deposits by mining companies, has held such representations misleading without proof of actual falsity where they are based on inadequate investigation (*In Re United States Chromium, Inc.*, 6 S. E. C. 882, 893) or where geographical assumptions have been endowed with misleading tangibility (*In Re Monitor Gold Mining Co.*, 4 S. E. C. 347, 348). Under the mail fraud statute, there are numerous instances in which a plan promulgated in good faith is lawful whereas the same plan executed with intent to defraud is a crime under the statute. *Robinson* v. *United States*, 33 F. 2d 238 (C. C. A. 9); *Byron* v. *United States*, 273 Fed. 769, 772–773 (C. C. A. 9), certiorari

denied, 257 U. S. 653; *Clapp* v. *United States,* 18 F. 2d 906, 907 (C. C. A. 8), certiorari denied, 275 U. S. 548; *Miller* v. *United States,* 133 Fed. 337, 342 (C. C. A. 8). In a case such as that before this Court in *Durland* v. *United States,* 161 U. S. 306, 314, where the scheme to defraud takes the form of glittering promises of future wealth, the Government certainly need not wait to ascertain that the promises have not been fulfilled before prosecuting a person who has made such statements recklessly, without belief in their truth. See also *Van Riper* v. *United States,* 13 F. 2d 961, 964 (C. C. A. 2), certiorari denied, *sub nom. Ackerson* v. *United States,* 273 U. S. 702, where it was held that the Government was not required to prove that statements made by defendants were false; that "it was enough for it to prove that they had no belief that the stocks had the value which they ascribed to them, or that they were wholly skeptical as to the prospects of the well and the other property."

In this very case, the conclusion of bad faith does not depend upon judgment as to ultimate verity. The success of the "I Am" movement is in itself proof that its doctrines, however unorthodox, were capable of being accepted. Witness after witness, both for the Government and for the defense, made it abundantly clear to the jury that persons of education and training found

petitioners' religious doctrines believable.[6] We do not think the jury had much difficulty in distinguishing between the good faith of these witnesses, some of whom not only followed the precepts of the movement but taught others as well (see R. 951, 955, 1085), and the bad faith of petitioners. Such a distinction obviously would not be based on the nature of the precepts taught. Nor would it be based on the mere fact that petitioners earned their living by propagating their doctrines. Persons may in entire good faith collect money and earn their livelihood by propagating religious doctrines which are unorthodox. But when the leaders of a movement from the start show more interest in making money than they do in spreading the faith, when their actions are as thoroughly saturated with commercialism as they were in this case, when they deliberately represent experiences as occurring in far places of the earth where they have never been, when they make the gross misrepresentations of fact about actual accomplishments of cures that were made here, then, we submit, a jury is not required to judge philosophical absolutes in order to find bad faith.

The judgment as to whether a person honestly

[6] Witnesses for the defense included persons with college education, some of whom had obtained graduate degrees. See, e. g., R. 945, 957, 968, 979.

believes views with which one disagrees is the kind of judgment that ordinary people regularly make of their associates. We do not believe that they lose the capacity to make such judgments merely because they happen to be called upon to act as jurors.

The view of the dissenting judge below (R. 1668–1673) that a trial on the issue of good faith is unconstitutional because, under the prior decision of this Court, neither the truth nor the falsity of miraculous occurrences can be an issue for the jury, overlooks the underlying basis for this Court's decision, the fundamental principle that "Men may believe what they cannot prove." 322 U. S. at p. 86. By definition, a miracle is an event outside natural law, and hence not subject to proof as a physical fact. As such it is simply not a matter upon which courts of law may act. Cf. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 106, in which this Court held that matters of medical opinion, such as the efficacy of mental healing did not present a question of fact upon which a postal fraud order could be based. On the other hand, good faith, intent, and other mental states are questions of fact (cf. *Seven Cases* v. *United States, supra*) which courts and juries can judge and do judge in virtually every criminal prosecution.

Furthermore, in this particular case, the possi-

ble limitations on the right of a defendant to prove a miracle have no significance. These petitioners expressed no desire to offer proof of their miraculous claims. From the start, in their demurrer to the indictment and motion to quash, petitioners insisted that their religious beliefs were not proper subjects of proof (E. g., R. 65, 67, 79, 81, 114, 115). They were not deprived of an opportunity to offer any evidence they wished to offer.

It is also suggested that prosecution based on lack of belief is constitutionally vulnerable because it may be applied to persons who have "less than full belief in a professed credo," 322 U. S. at p. 95. Here again, we think the danger of misapplication in some possible future borderline case is not so great that this Court, in anticipation of a situation that may never arise, must now lay down an absolute bar against any trial of persons who perpetuate a scheme to defraud under the guise of religion. The crime condemned by the mail fraud statute is the use of the mails in execution of a "scheme" either to defraud or to obtain money or property by false representations. It is not merely lack of belief or even solicitation of money without belief that is the crime. The offense is the solicitation of money without belief under such circumstances that it amounts to an "intentional effort to de-

spoil the public," i. e. a scheme to defraud.[7] There is, it is true, no fixed line marking the distinction between the solicitation of funds by persons who may entertain some doubts as to the tenets they profess and the devising of a scheme to defraud, but the absence of a fixed line of demarcation between guilt and innocence has never been considered a ground for barring the prosecution of those who are clearly guilty. See *Screws* v. *United States*, 325 U. S. 91; *Robinson* v. *United States*, 324 U. S. 282, 286. As this Court pointed out in *Santa Cruz Co.* v. *Labor Board*, 303 U. S. 453, 467, rigid mathematical formulae "are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' and 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion." Freedom of speech is as much a tenet of American political philosophy as freedom of religion; yet Congress and this Court have recognized that it does not serve to protect all forms of utterances. The "clear and present danger" doctrine enunci-

[7] A scheme to defraud has been broadly interpreted as encompassing all intentional efforts to despoil the public. *Durland* v. *United States*, 161 U. S. 306, 314; *Brooks* v. *United States*, 146 Fed. 223, 227 (C. C. A. 8); *Fournier* v. *United States*, 58 F. 2d 3, 5 (C. C. A. 7), certiorari denied, 286 U. S. 565; *United States* v. *Rowe*, 56 F. 2d 747, 749 (C. C. A. 2), certiorari denied, 286 U. S. 554.

ated in *Schenck* v. *United States,* 249 U. S. 47, which is recognized as a test for distinguishing between free and prohibited speech in war time, is not a rigid standard definable in absolute terms; the mental state, the intent with which particular words are uttered, may determine the question of guilt or innocence. *Hartzel* v. *United States,* 322 U. S. 680; see also dissenting opinion of Justice Holmes in *Abrams* v. *United States,* 250 U. S. 616, 628. It has never been suggested, however, that for this reason a person clearly shown to have the requisite intent to violate the statute may not be prosecuted.

A trial for mail fraud disguised as religion does not, as Mr. Justice Jackson suggests, involve merely spiritual matters. The lure here was not to the spirit alone. Petitioners held out the promise of concrete wealth on earth and good physical health. Such promises are the foundation of practically every mail fraud scheme that has been tried. The protection of persons susceptible to this type of appeal from deliberate efforts to prey upon such susceptibility is the specific purpose of the mail fraud statute. We submit that they are no less entitled to protection because the enticement is clothed in semi-religious rather than in economic phraseology. The least that the Government ought to be able to demand of persons holding before the public the bait of quick wealth or eternal good health is that they

do so in good faith with honest belief in their promises.

Essentially, the constitutional question comes down to this: is a jury of average American citizens so incapable of distinguishing between unorthodox views honestly entertained and views professed without belief as part of an intentional effort to despoil the public that, in any case, no matter what the circumstances, the Government must allow free use of the mails to persons who organize a purported religious movement in bad faith for the purpose of self-enrichment? We submit that American juries are not so prejudiced against unorthodox views that this Court must lay down an absolute bar against a prosecution such as this divorced from any consideration of the particular facts of the case before it. We suggest rather that the matter is one for determination on the basis of actual evidence in a particular case. This Court has condemned the practice of suggesting extreme cases which may never arise in order to test the constitutionality of a statute. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 526; *Santa Cruz Co.* v. *Labor Board,* 303 U. S. 453, 467. We suggest that the same principle is applicable here. The Constitution does not protect fraud, and, in this case, fraud was clearly shown.

A federal criminal prosecution under the mail fraud statute is authorized by the United States

Attorney, submitted to a grand jury, tried before a court and a petit jury, and subject to appellate review. The argument against the constitutionality of this prosecution rests solely on the fear that in some future case prosecutor, judges, and jury may not be able to distinguish between the unpopular and the fraudulent. We think that our judicial system affords ample protection against any such abuse, and that we may rely upon the good sense of American officers, American juries, and American judges as a sufficient guaranty that the mail fraud statute will not be used to infringe upon religious liberty.

II

SINCE THE INDICTMENT CLEARLY TENDERED THE ISSUE OF PETITIONERS' GOOD FAITH BELIEF IN THE REPRESENTATIONS MADE, IT WAS SUFFICIENT AS A PLEADING TO SUPPORT THE THEORY ON WHICH THE CASE WAS SUBMITTED TO THE JURY

Petitioners' contentions that the indictment failed to allege lack of belief and that the court's instruction to the jury not to consider the truth or falsity of religious representations resulted in an unconstitutional amendment in the indictment (Br. 37–44, 55–59), are fully discussed in the dissenting opinion of the late Chief Justice, 322 U. S. at pages 90–92.

A mere reading of the indictment shows that, as the late Chief Justice stated, it "plainly charged both falsity of, and lack of good faith belief in the

representations made." Each of paragraphs 1 to 18 (R. 8–20) first sets forth a particular representation and then alleges that defendants "well knew" that the representation was false. Paragraph 19 (R. 20) alleges that all of the representations were made as part of the scheme to defraud by means of oral statements, books, magazines, etc., "constructed and expressed as to deceive" and intended to deceive. Paragraph 20 (R. 21), alleges that defendants well knew that the representations were false and that they were made with intent to defraud for the purpose of enabling defendants to enrich themselves. It was, of course, entirely proper to set forth the nature of the representations made. If, constitutionally, appellants can be held liable for devising a scheme to defraud by making representations which they did not believe, then, clearly, the indictment properly specified the representations which the Government charged the defendants with propagating in bad faith. The allegation that defendants "well knew" that their representations were false and fraudulent necessarily includes the charge that the appellants did not believe the representations, for if a person knows a statement to be untrue, he must believe it to be untrue.

Petitioners argue that such allegations are common in ordinary indictments charging fraudulent misrepresentations of fact. This merely emphasizes, however, that the issue of a person's

good faith belief in his representations is inherent in every charge of fraud, and particularly in all indictments under the mail fraud statute. As the Second Circuit stated in *Knickerbocker Merchandising Co.* v. *United States,* 13 F. 2d 544, 546, certiorari denied, 273 U. S. 729, "all unconditional utterances, intended to be taken seriously, imply at least a belief * * *."

In view of the allegations as to defendants' knowledge of the falsity of their representations, as well as the general allegations of paragraphs 19 and 20 that the representations were made with intent to deceive as part of the scheme to defraud, the indictment was clearly sufficient to put defendants on notice that their good faith belief was an issue to be tried by the jury. That petitioners were well aware that their good faith was in issue is shown by their demurrer to the indictment in which they stated that the indictment "merely seeks to establish that the defendants do not believe that which they purport to believe" (R. 64–65). The indictment was therefore sufficient to charge the offense in the manner in which it was actually tried under the trial judge's instruction.

Insofar as the indictment alleged that petitioners' religious representations were false, it did, of course, allege more than was submitted to the jury and more than, under the prior decision of this Court, could constitutionally be tried.

However, the fact that an indictment contains irrelevant and unnecessary allegations does not warrant its dismissal if the remaining allegations state the essential elements of an offense. *United States* v. *New York Great A. & Pacific Tea Co.*, 137 F. 2d 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783. The unnecessary allegations may be rejected as surplusage without working a fatal amendment of the indictment. *Ford* v. *United States*, 273 U. S. 593, 602; *Johnson* v. *United States*, 59 F. 2d 42, 44 (C. C. A. 9), certiorari denied, 287 U. S. 631; *Farley* v. *United States*, 269 Fed. 721, 724 (C. C. A. 9). This rule has been applied where, on their face, some of the allegations of the indictment are meaningless, *United States* v. *Buckner*, 108 F. 2d 921, 925 (C. C. A. 2), certiorari denied, 309 U. S. 669; or are wholly ineffective to charge an offense, *Ford* v. *United States, supra; Sondericker* v. *United States*, 41 F. 2d 144 (C. C. A. 7); *Maresca* v. *United States*, 277 Fed. 727, 742 (C. C. A. 2), certiorari denied, 257 U. S. 657; or state "more than the proof can possibly show," *Bailey* v. *United States*, 5 F. 2d 437 (C. C. A. 5), petition dismissed, 269 U. S. 551. The essential test by which an indictment must be judged is whether it sufficiently apprises the accused of the charge against him and protects him from further prosecutions for the same offense. *Hagner* v. *United States*, 285 U. S. 427, 431–433; *Lamar* v. *United*

States, 241 U. S. 103, 116. This indictment clearly meets that test.

Since the indictment charged both falsity of and lack of good faith belief in the representations made, the action of the trial judge in withdrawing the issue of falsity did not result in a fatal amendment of the indictment. The fact that the issues submitted to the jury were less than the indictment charged is not a reason for holding the indictment invalid so long as the remaining allegations which were submitted to the jury constituted an offense under the statute. *Salinger* v. *United States,* 272 U. S. 542, 548, 549; *Hall* v. *United States,* 168 U. S. 632, 639.

The mail fraud statute prohibits the use of the mails in furtherance of any scheme to defraud, including a scheme to obtain money by false *or* fraudulent (not false *and* fraudulent) pretenses, representations, and promises. To disregard the allegations of falsity and try the case on the question of good faith belief was, therefore, merely to reject one of two alleged methods of committing an offense, as was done in the case of *Salinger* v. *United States,* 272 U. S. 542, 548–549, and in *Ford* v. *United States,* 273 U. S. 593, 602. That this necessitates the rejection of part of an allegation does not bar the application of this rule. The indictment before this Court in the *Ford* case, *supra,* charged the defendant with the formation of a conspiracy to import intoxicating liquors,

"the said acts to be then and there unlawful and prohibited and contrary to the provisions of Section 593, subdivision (b) of the Tariff Act of 1922, and the convention, agreement and treaty between the United States and Great Britain of May 22, 1924." The Court held that the allegations as to violations of the treaty, which did not state an offense, were properly rejected as surplusage. See also *Nichamin* v. *United States*, 263 Fed. 880 (C. C. A. 6), where the court considered as surplusage part of an allegation unnecessarily charging defendants with intent to convert property to their own use.

This indictment charged appellants with propagating a religious movement by making representations which were false and which they did not believe. The charge of falsity of the representations was withdrawn by the judge's charge, but the issue of good faith belief remained and was properly submitted to the jury.

III

THE ARGUMENT OF COUNSEL DOES NOT CONSTITUTE REVERSIBLE ERROR.

Petitioners quote a number of passages from the summations by government counsel which they contend were so improper that their convictions should be reversed on such ground alone (Br. 13–36). Arguments of counsel were undoubtedly vigorous and dramatic, but we do not believe that as a whole they exceeded proper bounds.

Many of the remarks to which petitioners object were not improper. The essence of the charge in this case, amply supported by the evidence, is that petitioners were using religion as means to defraud. The references to the petitioners as frauds or "fakers" (Br. 25–26) was therefore merely a permissible characterization of the whole theory of the case. *Shushan* v. *United States,* 117 F. 2d 110, 118 (C. C. A. 5), certiorari denied, 313 U. S. 574; *Randle* v. *United States,* 113 F. 2d 945, 950 (App. D. C.), certiorari denied, 311 U. S. 683; *Schmidtberger* v. *United States,* 129 F. 2d 390 (C. C. A. 8); *Gray* v. *United States,* 14 F. 2d 366, 367 (C. C. A. 8). Much stronger denunciations of defendants have been upheld. *United States* v. *Wexler,* 79 F. 2d 526, 530 (C. C. A. 2), certiorari denied, 297 U. S. 703; *United States* v. *Holt,* 108 F. 2d 365, 369 (C. C. A. 7), certiorari denied, 309 U. S. 672. The alleged assertions by the prosecutor of matters of personal knowledge, set forth at pages 27–28 of petitioners' brief, disclose on their face that they were rhetorical in nature and were not assertions of fact outside the evidence. The reference in closing argument to a prior conviction of other purported religious leaders (Br. 29) was in answer to defense counsel's argument that the trial was a novel one, the prosecutor expressly stating that he mentioned the earlier case only because the defense counsel had done so (R. 1497–1498). The prosecutor's

statement about Mrs. Schall to which petitioners object (Br. 31) was that she "originally" became interested in the movement in an attempt to cure her husband's blindness, a fact established by the evidence (R. 394). The statements that a verdict in this case would be warning to others who might attempt to use religion as a means to defraud (Br. 31–33) were fair comment; similar statements to a jury have been upheld in other cases. *United States* v. *Dillard,* 101 F. 2d 829, 837–838 (C. C. A. 2), certiorari denied, 306 U. S. 635; *Diggs* v. *United States,* 220 Fed. 545, 555 (C. C. A. 9), affirmed, 242 U. S. 470; *Remus* v. *United States,* 291 Fed. 501, 511–512 (C. C. A. 6), certiorari denied, 263 U. S. 717.

Petitioners assert that, in discussing their beliefs, government counsel went beyond the theory on which the case was submitted to the jury and overstepped constitutional limitations. They refer to a number of instances which they claim represent such improper conduct, most of which occurred during opening argument by government counsel. Of these, we submit that the reference to the failure of petitioners to produce evidence of persons cured of physical ailments (see Br. 18) was proper, for, as the prosecutor pointed out (R. 1224–1225), and as we have shown (see Statement, *supra,* pp. 9, 14), petitioners represented, not merely that they could cure, but they had cured hundreds of persons. Since such representation was one of

physical fact capable of proof, it was not improper to demand evidence of the basis for such assertions. The question whether Donald Ballard had actually had experiences with St. Germain (R. 1318, see Br. 17–18) was proper in its context since the prosecutor referred to testimony that Donald himself had stated that he had had no such experiences (R. 1317; see Statement, *supra*, p. 17). Even the passages referring to the failure of petitioners to precipitate are not as objectionable as they appear on the surface, for there was evidence that Mrs. Ballard had on occasion led her followers to believe that she had in her possession a precipitated stone (R. 363). The only passages which we think may be open to criticism are those in which the prosecutor questioned the possibility of supernatural visitation and referred to Mr. Ballard's failure to obtain immortality (see Br. 19–21).

Nevertheless, we do not believe that such statements require reversal of petitioners' convictions. As this Court has recently pointed out in *Kotteakos* v. *United States*, Nos. 457–458, O. T. 1945, decided June 10, 1946, the prejudicial effect of an alleged error in a criminal trial cannot be judged *in vacuo* but must be determined with reference to the case as a whole. The question here is not whether particular sentences may or may not have been improper, but whether, in the light of the whole case, the prosecutor's conduct was such as

to deprive petitioners of a fair trial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 239–240; *Pietch* v. *United States*, 110 F. 2d 817, 822 (C. C. A. 10), certiorari denied, 310 U. S. 648. The nature of the charge, the general atmosphere of the trial, the action of defense counsel in interposing objections, the strength of the evidence, are all factors to be considered in determining whether remarks of counsel constitute ground for reversal. Judged by these standards, we submit that the few remarks of counsel which are subject to criticism do not constitute reversible error.

In the first place, the passages attacked as improper appear much more significant when read alone than they do when read in their context. Considered as isolated statements, they appear to be dramatic highlights which would be likely to impress a jury. In their context, however, they are by no means outstanding. The summations, particularly the opening argument of government counsel, are consistently forceful, and the passages quoted by petitioner are no more flamboyant than other portions of the summations to which no objection can be made. The opening argument of government counsel covers 143 pages of the printed record (R. 1181–1324) and the closing argument 52 pages (R. 1493–1545). The references to petitioner's beliefs were only a minor part of the summations.

Much more time was devoted by the prosecutors to the evidence which we have summarized in the Statement, *supra,* which properly could be considered by the jury on the issue of good faith, i. e., the fact that petitioners represented that the adventures recited in the books were true on a physical plane (R. 1218, 1268–1272, 1504–1510, 1526, 1533–1534); the misrepresentations as to actual cures (R. 1222–1226, 1229–1232, 1542); the representations as to the blue phonograph records (R. 1228–1229, 1514); the callous manner of answering requests for healing by form letters (R. 1289–1290, 1520); the direct admissions of bad faith by Donald Ballard (R. 1321–1322, 1543). And again and again throughout the summations, government counsel emphasized, as the most important factor to be considered by the jury, the commercialism which dominated the actions of petitioners, commenting thereon in forcible and vigorous language (R. 1192–1210, 1219, 1227–1229, 1258–1260, 1261–1262, 1264–1266, 1279–1285, 1287, 1290–1291, 1296–1297, 1522–1523, 1525, 1526, 1530). Under these circumstances, we submit that the petitioners and the dissenting judge below have magnified the few offending remarks of counsel out of all proportion to their significance in the argument.

It is to be noted that trial counsel did not object to the portions of the summations here involved. They did object to the characterization

of Mrs. Ballard as a faker (R. 1188–1190) and at that point the trial judge instructed the jury as follows (R. 1190):

> Gentlemen of the jury, you are the sole judges of the facts in this case. On either side I am going to permit fullest argument and that is why I permitted the fixing the length of the argument so it can be thoroughly argued to the jury. You have listened to the evidence, and I again instruct you now to disregard any statements made by counsel on either side which you think in your best judgment have no foundation in fact from the evidence. In the heat of argument on both sides counsel will probably make remarks that do not fully conform to the evidence. Lawyers will do that, and even individuals will do that in the heat of argument. I just give you that general caution, and I think with the good sense and intelligence of the jury, if you find that extreme or extraordinary statements have been made, that you will disregard those statements and only pass judgment upon the evidence as interpreted by counsel.

Thereafter, no further objection to argument of government counsel was made, and no exception was reserved at the close of the argument. In view of that fact that petitioners were represented by capable and experienced counsel (see R. 1183–1184), and in view of the strength of the evidence against petitioners, their failure to ex-

cept to argument of counsel would in itself justify refusal to reverse on such ground. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 238–239, where this Court said: "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

The trial as a whole was eminently fair to petitioners. Except for final arguments, the only action by the prosecutor in the course of the long trial to which petitioners now object are two minor questions asked in the lengthy examination of Mrs. Ballard (Br. 21–22).

The only other incident to which petitioners point as a departure from the underlying theory of the case was the question about precipitation asked by a juror of Cassiere, a co-defendant, after he had testified to his idea of precipitation (R. 1105). Although the truth or falsity of the power of precipitation was not an issue for the jury, nevertheless the jury was entitled to know what the defendants represented. It was therefore not improper for the juror to seek clarification as to whether the defendants professed to believe in "a precipitation of gold or jewels from the invisible to the visible" (R. 1105; Ex. 5, pp. 97–98) or precipitation in the form of obtaining articles by natural means such as the buying of a shirt (R. 1105–1106). The judge's statement that the matter was one for

argument of counsel did not refer to the power to precipitate but to the fact that Cassiere was then expounding a theory of precipitation different from the one set forth in the books which he admitted he had taught (R. 1106).* That the question did not reflect a lack of understanding of the issues as limited by the trial judge is shown by the fact that Cassiere was acquitted.

Above all, in judging the effect of the prosecutor's argument it is important to remember that, throughout the trial, the jury had constantly been told that the truth or falsity of petitioners' representations in the nature of religious beliefs was not a matter for their determination but that they were to judge good faith alone. Early in the trial the judge gave the instruction upon which the prior decision of this Court turned—that the verity of religious experiences as such was not an issue for their determination (R. 402–404). This caution was reiterated throughout the trial. Counsel for the defense objected before the

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* The record reads as follows (R. 1106):

"The Witness: All is precipitation. No matter what I get I now ask God for and so I include everything that I now receive as precipitation from my own God-self and I never stop thanking that God-self for producing what I require.

* * * * *

"Juror Barton: Isn't that something different from what we have been talking about as precipitation?

"The Court: That is going to be a matter for the attorneys on both sides to argue to the jury, and that will be a matter for you gentlemen to decide."

jury to questions propounded by the prosecutor because they conflicted with this instruction (R. 502) and stated before the jury that they were predicating their presentation of the case on the instruction (R. 1125–1126). Many of the remarks to which petitioners now object were made in the opening argument for the Government and that was followed by argument of defense counsel in which they repeated the judge's admonition in substance (R. 1336) and in *haec verba* (R. 1346–1349). The same instruction was also included in the judge's charge to the jury (R. 1576) and reiterated throughout the charge (R. 1571–1572, 1588–1590). Furthermore, in his instructions to the jury the judge stated, "You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts" (R. 1597). In view of this emphasis on the underlying theory of the case, the few statements of counsel that may be considered in conflict therewith could not have misled the jury and should not be considered prejudicial."

This was not, like *Berger* v. *United States*, 295 U. S. 78, a weak case. The evidence set forth in the Statement, *supra*, admits of no doubt that the "I Am" movement was promulgated by petitioners in bad faith for the purpose of making money. Hence, the argument of counsel, even

assuming that it may have been in some respects improper, does not warrant reversal of the conviction (*McFarland* v. *United States*, 150 F. 2d 593, 594 (App. D. C.), certiorari denied, 326 U. S. 788; *United States* v. *Dubrin*, 93 F. 2d 499, 506 (C. C. A. 2), certiorari denied, 303 U. S. 646), particularly in view of the judge's caution that guilt was to be determined on the evidence and not on the arguments of counsel. *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 239–240; *Dunlop* v. *United States*, 165 U. S. 486, 498; *Chadwick* v. *United States*, 117 F. 2d 902, 905 (C. C. A. 5), certiorari denied, 313 U. S. 585; *Landay* v. *United States*, 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681; *Borgia* v. *United States*, 78 F. 2d 550, 555 (C. C. A. 9), certiorari denied, 296 U. S. 615.

Finally, we suggest that where, as here, error is alleged to consist of an improper appeal to the emotions of the jury, an appellate court may take into consideration the fact that the verdict intrinsically shows that the jury was not so influenced. In this case, the jury's verdict demonstrates that the remarks of counsel had none of the damaging effects which petitioners attempt to attribute to them. It is undisputed that the four defendants who were acquitted by the jury at the same time that petitioners were convicted were all active in the "I Am" movement, preaching its doctrines and participating in the solicitation

of funds for its advancement (see R. 1015, 1088–1089, 1168–1169, 1172–1173). The acquittal of these four persons cannot be explained merely on the ground that they were not the active heads of the movement, for if the jury believed that no person could honestly entertain and further such unorthodox views, that factor would have made no difference. Manifestly the jury did not judge the credibility of the doctrines, but the honesty of the persons preaching them.

IV

THE EXCLUSION OF WOMEN FROM THE PANEL OF GRAND AND PETIT JURORS DOES NOT NECESSITATE REVERSAL OF PETITIONERS' CONVICTIONS OR DISMISSAL OF THE INDICTMENT

Petitioners challenge the validity of both the indictment and the trial (Br. 60–74) on the ground that women, although eligible for jury service under California law (Code of Civil Procedure, sections 190–193, 198),[9] and hence qualified for service in the federal courts under Section 275 of the Judicial Code (28 U. S. C. 411),[10] were

[9] In 1917 these provisions of the Code were amended to substitute the word persons for men, thus qualifying women for jury service. California *Statutes*, 1917, p. 1282.

[10] This section provides:

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications . . . and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

systematically excluded from the panel of grand and petit jurors. Petitioners raised this issue by a motion to quash the indictment (R. 109–110, 145) and by a challenge to the array of the petit jurors (R. 232). At the opening of the trial it was stipulated that "no women were called on this panel as trial jurors solely because of the fact that they were women and following the usual practice in this district;" "that it was always the practice of the judges in this court to not use women" (R. 233).[11] Both motions were denied (R. 149, 233). The overruling of these motions was assigned as error (R. 191–192), but the question was not briefed or argued on the original appeal to the circuit court of appeals, and it was not briefed or argued in this Court. It was, however, raised on the remand of the cause.

The Government does not deny that women were eligible for jury service in the federal district courts in California and that no valid reason appears in the record for their exclusion.[12]

[11] Women are now called for jury duty in the federal district courts in California, *United States* v. *Chaplin*, 54 F. Supp. 682 (S. D. Cal.).

[12] Petitioners moved to quash a previous indictment (subsequently dismissed) because of the exclusion of women from the panel of grand jurors. From the decision on that motion (*United States* v. *Ballard*, 35 F. Supp. 105, 106), it appears that the policy of excluding women in the United States District Court for the Southern District of California may have resulted from the belief that a federal jury was a common law jury, limited to men.

Not every irregularity in the manner of selecting a jury is, however, ground for quashing an indictment or reversing a conviction. *Hyde* v. *United States*, 225 U. S. 347, 374; *Agnew* v. *United States*, 165 U. S. 36, 44; *United States* v. *Parker*, 103 F. 2d 857, 859 (C. C. A. 3), certiorari denied, 307 U. S. 642; *Morrison* v. *United States*, 71 F. 2d 358, 359 (C. C. A. 5), certiorari denied, 293 U. S. 589; *Moffatt* v. *United States*, 232 Fed. 522, 528 (C. C. A. 8); *Brookman* v. *United States*, 8 F. 2d 803, 806 (C. C. A. 8).[13] This Court has granted such drastic relief only where an unqualified juror has participated in the proceedings (*Crowley* v. *United States*, 194 U. S. 461), where there has been a denial of a constitutional right (*Smith* v. *Texas*, 311 U. S. 128, 130, and cases these cited), or where the manner of selection tends to overload the jury with members of a particular economic class. *Thiel* v. *Southern Pacific Co.*, No. 349, O. T. 1945, decided May 20, 1946. See *Glasser* v. *United States*, 315 U. S. 60, 85. It has refused such relief where the manner of selection affected merely the composi-

[13] In *United States* v. *Cornell*, 25 Fed. Cas., No. 14,868, at 656 (D. R. I. 1820), Justice Story, in denying a motion for a new trial in a murder case, said: "Even if a juror had been set aside by the court, for an insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impaneled, and above all exceptions. Neither the prisoner nor the government in such a case have suffered any injury."

tion of a particular jury chosen from a representative and qualified group. *Hyde* v. *United States*, 225 U. S. 347, 374; *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642, 646. See *Rawlins* v. *Georgia*, 201 U. S. 638, 640. We submit that failure to summon women jurors falls within the principle of the latter decisions rather than the former, and hence that the exclusion of women does not constitute ground for setting aside an indictment or a conviction returned by a jury whose qualifications, impartiality, and representative character are not otherwise challenged.

No constitutional question is involved. The exclusion of women here imposed by practice is still imposed by law in 19 states of the union.[14] The Nineteenth Amendment applies only to suffrage and does not automatically confer on women the right to serve on juries. *United States* v. *Ballard*, 35 F. Supp. 105, 107 (S. D. Cal.), and cases there cited. Challenges to the validity of the disqualification or limitation of women jurors as a violation of the due process and equal protection clauses of the Fourteenth Amendent have

[14] Report to the Judicial Conference of the Committee on the Selection of Jurors, 1942, p. 23. Of the 20 states there listed as disqualifying women as jurors, three have since made women eligible for jury service. Colorado Laws 1945, c. 159; Idaho Laws, 1943, c. 158; Missouri, Rev. Stat. Ann. (1945 Supp.), sec. 697. North Carolina and South Carolina should, however, be listed among the states in which women are disqualified. See *State* v. *Emery*, 224 N. C. 581 (1944); S. C. Code of Laws (1942), sec. 608.

been consistently denied. *Hall* v. *State*, 136 Fla. 644, 664 (1939); *Powers* v. *State*, 172 Ga. 1 (1930); *Commonwealth* v. *Welosky*, 276 Mass. 398, 413–417 (1931), certiorari denied, 284 U. S. 684; *State* v. *Dreher*, 166 La. 924, 943–944 (1928), certiorari denied, 278 U. S. 641; *Glover* v. *Cobb*, 123 S. W. 2d 794, 796–797 (Tex., 1938); see *Strauder* v. *West Virginia*, 100 U. S. 303, 310. This Court in *Glasser* v. *United States*, 315 U. S. 60, 64–65, recognized that women did not become eligible for federal jury service until specifically qualified by state law, thus, in effect, affirming the right of states to exclude women. The absence of constitutional prohibitions against discrimination on account of sex *ipso facto* distinguishes this case from those involving discrimination against a particular race in violation of the Fourteenth Amendent. *Smith* v. *Texas*, 311 U. S. 128, 130, and cases there cited.

Nor does discrimination because of sex come within the principle enunciated by this Court in its recent decisions in *Thiel* v. *Southern Pacific Co.* and *Glasser* v. *United States, supra.* Those decisions are directed against limitations of the jury to a particular economic class in order to prevent the undue loading of a jury with persons likely to have a similar economic outlook. The limitation of the jury to members of a particular sex involves no such danger. The fact that women are properly treated as a separate class

for certain purposes, such as regulation of hours of labor, in which physical differences are significant (see Br. 71), does not mean that they act as a class when sitting as jurors.[15] The factors which tend to influence the action of women jurors are the same as those which influence the action of men—personality, background, economic status—not sex. See Miller, *The Woman Juror,* 2 Oregon L. Rev. 30, 42 (1922). This Court in the *Thiel* case, *supra*, stated that, despite the fact that qualifications for federal jurors depend on state law, an unlawful qualification created by the state is not binding and should not be followed in summoning federal jurors. Unquestionably an unlawful disqualification would equally be disregarded. Yet, as we have shown, this Court has recognized that women are not eligible for federal jury service until qualified by state law. It necessarily follows, therefore, that disqualification on account of sex has not been treated as a matter affecting the fundamental character of a jury. There is thus no reason for this Court in this case to exercise its supervisory powers over the administration of justice

[15] We think that petitioners' argument (Br. 60–74), the opinion of the dissenting judge below (R. 1660–1668), and the decision in *United States* v. *Roemig*, 52 F. Supp. 857 (N. D. Iowa), on which petitioners rely (Br. 70–71), are based on an erroneous assumption that discrimination on account of sex carries with it the same potentialities of bias as discrimination in favor of a particular economic class.

in the federal courts to reverse the conviction of petitioners, irrespective of any showing of prejudice, as was done in the *Thiel* case, *supra*.[16]

Petitioners assert, however, that in this case, actual prejudice must be presumed, since Mrs. Ballard is a woman (Br. 66). So to hold would be in effect to find that in 19 states of the union a woman can never have a fair trial. We submit that such a conclusion is not justified. As we have shown, *supra*, p. 54, disqualification on account of sex carries with it none of the potentiali-

[16] This Court has not hitherto considered the exclusion of women a matter requiring its supervisory regulation. It has denied certiorari in two cases in which the question was raised. *Pelley* v. *United States*, Nos. 645–647, O. T. 1942, certiorari denied, 318 U. S. 764; *Zap* v. *United States*, No. 489, O. T. 1945, certiorari denied on this point, 326 U. S. 802. Both these petitions were presented after the decision of this Court in *Glasser* v. *United States*, *supra*.

The problem no longer has much practical significance. A canvass of the United States Attorneys in all states in which women are made eligible for service by state law reveals that only in the western district of Arkansas are women excluded without any apparent reason. In Louisiana women are eligible only if they register for service (Gen. Stat. (Dart), Sec. 1938), and we are informed that no women have volunteered for jury service in the federal district courts there. In Rhode Island, women are qualified for jury duty only when the jury commissioner has determined that proper accommodations exist. Laws of R. I. (1939), c. 700, sec. 37. The United States Attorney informs us that the local district judges consider that accommodations in the federal building are inadequate. In Maine, the United States Attorney informs us that women are not called because of the lack of proper facilities.

ties of prejudice inherent in discrimination on account of race, religion, or economic class. It certainly cannot be said that men are inherently prejudiced against women defendants. If the reason given for the exclusion of women jurors had been lack of proper facilities for their accommodation (see Report to the Judicial Conference of the Committee on the Selection of Jurors, p. 23), we do not believe that this Court would hold such action to be an abuse of the discretionary power of the district court. It is no more prejudicial because the same result may have been caused by a mistaken concept of the constitutional nature of a federal jury. As the Supreme Court of California stated in *People* v. *Shannon*, 203 Cal. 139, 142 (1928):[17]

> * * * there is nothing in the state or federal constitutions, or in any statute, which guarantees one accused of a crime a trial by a jury composed of men and women, or of only men, or of only women, or of any definite proportion of either sex. His right is to a fair and impartial jury, and not to a jury composed of any particular individuals. * * * He cannot complain if he is tried by any impartial jury, and can demand nothing more.

[17] We do not, as petitioners assert (Br. 65), contend that this Court is bound by California state decisions as to what constitutes prejudicial error in the selection of jurors, but we do urge that the position of the California Court is sound and should be followed.

The position of the dissenting judge below that petitioners were prejudiced by the absence of women because women are more religiously inclined (R. 1663–1666) is, we submit, untenable. Receptivity to spiritual appeal has never been limited to one sex. This very case is proof to the contrary, for of the 35 followers of the movement, exclusive of the defendants, who testified in petitioners' behalf, almost half—16—were men (R. 935, 945, 953, 957, 965, 968, 971, 987, 996, 1004, 1046, 1056, 1057, 1081, 1085, 1118).

Petitioners were indicted and tried by qualified jurors chosen from among the community without violation of any constitutional right. Under such circumstances, they are in no position to attack the indictment or their conviction because of the manner in which the juries were assembled.

CONCLUSION

The judgment below should be affirmed.

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Frankfurter J. pp. 1, 3.

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1946.

Edna W. Ballard and Donald Ballard, Petitioners, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here for the second time. It involves the indictment and conviction of respondents for using, and conspiring to use, the mails to defraud. Criminal Code § 215, 18 U. S. C. § 338; Criminal Code § 37, 18 U. S. C. § 88. The fraudulent scheme charged was the promotion of the I Am movement, which was alleged to be a fraudulent religious organization, through the use of the mails. The nature of the movement and the facts surrounding its origin and growth are summarized in our prior opinion. 322 U. S. 78. It is sufficient here to say that petitioners were found guilty on a charge by the trial judge which withheld from the jury all questions concerning the truth or falsity of their religious beliefs or doctrines. The Circuit Court of Appeals reversed and granted a new trial, holding it was error to withhold those questions from the jury. 138 F. 2d 540. We, in turn, reversed the Circuit Court of Appeals and sustained the District Court in that ruling. Petitioners argued, however, that even though the Circuit Court of Appeals erred in reversing the judgment of conviction on that ground, its action was justified on other distinct grounds. But the Circuit Court of Appeals had not passed on those other questions; and we did not have the benefit of its views on them. We accordingly deemed it more appropriate to remand the cause to that court so that it might first pass on the questions reserved.

On the remand the Circuit Court of Appeals, one judge dissenting, affirmed the judgment of conviction without discussion of the issues raised. On a petition for rehearing, which was denied, the Circuit Court of Appeals filed an opinion which discussed some but not all of the questions which had been reserved. 152 F. 2d 941. We granted the petition for certiorari because of the serious questions concerning the administration of criminal justice which were raised.

We are met at the outset with the concession that women were not included in the panel of grand and petit jurors in the Southern District of California where the indictment was returned and the trial had; that they were intentionally and systematically excluded from the panel.[1] This issue was raised by a motion to quash the indictment and by a challenge to the array of the petit jurors because of intentional and systematic exclusion of women from the panel. Both motions were denied and their denial was assigned as error on appeal. The jury question has been in issue at each stage of the proceedings, except the first time that the case was before us. At that time the point was not assigned or argued. But the case was here at the instance of the United States, not at the instance of the present petitioners. As we have said, there were other issues in the case obscured by the question brought here by the United States and which had not been passed upon below or argued before this Court. Consequently, when we remanded the case for consideration of the remaining issues by the Circuit Court of Appeals, the jury issue was argued. The Circuit Court of Appeals did not hold that it had been waived. That court passed upon the issue, concluding that there was no error in the exclusion of women from the panel. 152 F. 2d p. 944, and see dissent at

[1] Women have been members of both grand and petit juries in that district since the beginning of the February Term, 1944. See *United States* v. *Chaplin*, 54 F. Supp. 682.

p. 953. Under these circumstances we cannot say (and the government does not suggest) that petitioners have lost the right to urge the question here. Moreover, in this case, as in *Reynolds* v. *United States*, 98 U. S. 145, 168–169, the error, though not presented here on the first argument appears on the face of the record before us. And see *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

Congress has provided that jurors in a federal court shall have the same qualifications as those of the highest court of law in the State. Judicial Code § 275, 28 U. S. C. § 411. This provision applies to grand as well as petit juries.[2] Congress also has prohibited disqualification of citizens from jury service "on account of race, color, or previous condition of servitude."[3] It has required that jurors shall be chosen "without reference to party affiliations".[4] It has provided that jurors shall be returned from such parts of the district as the court may direct "so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district".[5] None of the specific exemptions[6] which it has created is along the lines of sex.

These provisions reflect a design to make the jury "a cross-section of the community" and truly representative of it. *Glasser* v. *United States*, 315 U. S. 60, 86.

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[2] Thus Judicial Code § 276, 28 U. S. C. § 412 provides for the drawing of "All such jurors, grand and petit" from persons "possessing the qualifications prescribed" in § 411.

[3] Judicial Code § 278, 28 U. S. C. § 415.

[4] Judicial Code § 276, 28 U. S. C. § 412.

[5] Judicial Code § 277, 28 U. S. C. § 413.

[6] No person shall serve as a petit juror "more than one term in a year". Judicial Code § 286, 28 U. S. C. § 423.

Artificers and workmen employed in armories and arsenals of the United States are exempted from service as jurors. 50 U. S. C. § 57. Cf. Judicial Code § 288, 28 U. S. C. § 426, dealing with disqualifications of jurors in prosecutions for bigamy, polygamy or unlawful cohabitation.

In California, as in most States,[7] women are eligible for jury service under local law. Code of Civil Procedure, § 198. The system of jury selection which Congress has adopted contemplated, therefore, that juries in the federal courts sitting in such States would be representative of both sexes. If women are excluded, only half of the available population is drawn upon for jury service. To put the matter another way, Congress has referred to state law merely to determine who is qualified to act as a juror. Whether the method of selecting a jury in the federal court from those qualified is or is not proper is a question of federal law.[8] *Glasser* v. *United States*, *supra*, pp. 85–86.

In *Thiel* v. *Southern Pacific Co.*, 328 U. S. —, we were presented with a similar problem. It was a civil case which had been removed to the district court on the ground of diversity of citizenship and involved a question of the liability of a common carrier to a passenger. All persons who worked for a daily wage had been deliberately and intentionally excluded from the jury lists. We held, in the exercise of our power of supervision over the administration of justice in the federal courts, see *McNabb* v. *United States*, 318 U. S. 332, that the plaintiff's motion to strike the panel should have been granted. The gist of our ruling is contained in the following statement from the opinion in the *Thiel* case:

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[7] Report to the Judicial Conference of the Committee on Selection of Jurors (1942), p. 23.

[8] An earlier indictment (subsequently dismissed) was returned against petitioners who moved to quash because of the exclusion of women from the panel of grand jurors. The motion was denied. *United States* v. *Ballard*, 35 F. Supp. 105. That ruling seems to have been influenced by the thought that California law determined whether the exclusion of women resulted in a proper jury. Under California law the inclusion of women on the panel is not obligatory, the statutory provisions which qualify them for jury service being directory only. *People* v. *Shannon*, 203 Cal. 139; *People* v. *Parman*, 14 Cal. 2d 17.

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." 328 U. S. —.

We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts, *McNabb* v. *United States, supra*, to correct an error which permeated this proceeding.

It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex.[9] Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury

[9] See Miller, The Woman Juror, 2 Oregon L. Rev. 30; cf. Carson, Women Jurors (1928), p. 15.

was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.[10] To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

The present case involves a prosecution of a mother and her son for the promotion of an allegedly fraudulent religious program. Judge Denman in his dissent below stated:

> "In the average family from which jurors are drawn, the souls of children in their infant and early adolescent bodies receive the first and most lasting teaching of religious truths from their mothers. In the same families the major social function of men is concerned with the creation of material things, largely food and clothing and housing of the children's bodies.
>
> "In the public schools over ninety-five per cent of the primary and grammar school teachers are women. In the churches of all religions the numbers of women attendants on divine service vastly exceed men. The one large and vital religious group created in America since Joseph Smith is that of the Christian Scientists founded by a woman, Mary Baker Eddy.
>
> ". . . It matters not that from my viewpoint there is . . . testimony of a conspiracy so mean and vile that it warrants some of the strongest strictures of

[10] The problem is reflected in the discussions of the androcentric theory and the gynaecocentric theory in scientific literature. See Ward, Pure Sociology (1903), Ch. XIV; Draper et al., Human Constitution in Clinical Medicine (1944), Ch. VI.

the prosecution. I am not a woman juror sitting in the Ballard trial, who is the mother of five children at whose knee have been instilled in them the teachings of Jesus as interpreted by Mrs. Eddy.

"Well could a sensitive woman, highly spiritual in character, rationalize all the money income acquired by Mrs. Ballard as being devoted to the teachings of the same Jesus as are the profits of the trust created by Mrs. Eddy for the Christian Science Monitor." 152 F. (2d) pp. 951–52.

The point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not depend on a showing of prejudice in an individual case.[11] The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith* v. *Texas*, 311 U. S. 128, or an economic or social class, *Thiel* v. *Southern Pacific Co.*, *supra*, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in *United States* v. *Roemig*, 52 F. Supp. 857, 862, "Such action is operative to destroy the basic democracy and classlessness of jury personnel." It "does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him." Cf. *Kotteakos* v. *United States*, 328 U. S. —. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

If, as in the *Thiel* case, we had merely an instance of a petit jury drawn from an improper panel, we would

[11] Cf. *Wuichet* v. *United States*, 8 F. 2d 561–63.

remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed. In disposing of the case on this ground we do not reach all the issues urged and it is suggested that in so limiting our opinion we prolong an already lengthy proceeding. We are told that these petitioners will again be before us for the determination of questions now left undecided. But we cannot know that this is so, and to assume it would be speculative. The United States may or may not present new charges framed within the limits of our earlier opinion. A properly constituted grand jury may or may not return new indictments. Petitioners may or may not be convicted a second time.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1946.

Edna Ballard and Donald Ballard, Petitioners, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1946.]

Mr. Justice Jackson, concurring.

I concur in the result, but for quite different reasons. I join the opinions of Mr. Justice Frankfurter and of Mr. Justice Burton to the effect that we should not now direct dismissal of the indictment upon the jury question. In my opinion, the point either was abandoned by the parties or if not, was ignored or silently rejected by the Court in its prior decision, 322 U. S. 78, and should not be revived now. I therefore reach the other issues in the case. I would direct dismissal of the indictment upon the grounds stated in dissent in *United States* v. *Ballard*, 322 U. S. 78 at 92, and a further ground. This Court previously ruled that it is improper for the trial court to inquire whether the religious professions and experiences as represented by defendants were true or false but that it can inquire only as to whether they were represented without belief in their truth. This leaves no statutory basis for conviction of fraud and especially no basis for conviction under this indictment. It requires, in my opinion, a provably false representation in addition to knowledge of its falsity to make criminal mail fraud. Since the trial court is not allowed to make both findings, the indictment should be dismissed.

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1946.

Edna W. Ballard and Donald Ballard, Petitioners, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1946.]

Mr. Justice Frankfurter, with whom the Chief Justice, Mr. Justice Jackson and Mr. Justice Burton ~~concur) dissenting~~ join.

In the exercise of its supervisory power over the lower federal courts, the Court is directing the dismissal of the indictment in this case, because, following the practice then prevailing in the federal district court in California, no women were included in the panel of the grand jury which found the indictment. My brother Burton demonstrates, I believe, that under the circumstances the absence of women from the grand jury panel did not vitiate the indictment. But, in any event, this Court's authority to supervise practice in the lower federal courts should be exercised only to vindicate appropriate standards of judicial administration. In finding that the exclusion of women from the grand jury panel is fatal to the indictment, the Court embraces a claim for the benefit of the petitioners which they themselves abandoned more than four years ago. And since women have not been excluded from jury service in the California federal courts since 1944, the Court cannot justify its action as a means of emphasizing to the lower courts the duty of adopting a proper practice. Thus the Court directs the dismissal of an indictment under circumstances in which the Court's action does not advance the proper administration of criminal justice.

The defendants were fully cognizant of the facts and of the issues involved when they made their objection to the composition of the grand jury panel and when they abandoned it. They objected to the array before the dis-

trict court, saved the point when their objection was overruled, and assigned it as one of the errors in their specifications on appeal to the Circuit Court of Appeals. In ample time for the defendants to rely on it in the Circuit Court of Appeals, this Court decided *Glasser* v. *United States*, 315 U. S. 60, which indicated that we deemed it important that a jury be selected on what may be described as a modern democratic basis. And yet the point made and overruled in the District Court was not argued in the briefs before the Circuit Court of Appeals, although the defendants vigorously urged other claims to reverse their convictions. The fact that the jury question was "in issue" before the Circuit Court of Appeals, in the sense of having been assigned as error, but was neither briefed nor argued there, only serves to emphasize the abandonment of the issue before that court. When on the Government's petition the case came before this Court, the defendants surely pressed every claim that seemed to them relevant to sustain the judgment which the Circuit Court of Appeals had entered in their favor. For it is too well settled to require citation of cases that the respondent here may urge and support any ground by which judgment in his favor can be sustained, whether or not it was argued in the court below. Their briefs and oral argument vigorously urged other issues going to the validity of the indictment. The exclusion of women was not even mentioned. And this Court, with the full record before it, took no notice of this question which now is found to undermine the entire proceedings. When we remanded the case to the Circuit Court of Appeals we plainly did so to have that court decide questions argued here which it had left undecided. We would hardly have invited its decision on questions which had been abandoned and not argued before it. If a procedural point can ever be abandoned, objection to the jury panels was here abandoned.

With the *Glasser* opinion before them and with the point properly preserved in their appeal papers, the abandon-

ment of the issue by the petitioners, when the case came before the Circuit Court of Appeals and later before us, can mean only that they had no confidence in the claim, and that, in any event, they had not been hurt by what is now deemed a fatal error. It hardly helps the proper administration of criminal justice to allow the defendants to resurrect a point which they had dropped four years earlier.*

Even now, this Court does not find that the exclusion of women constitutes an inroad on the vital safeguards for a criminal trial so as to involve a denial of due process.

*The two cases invoked by the Court are inapposite. The circumstances in *Reynolds* v. *United States*, 98 U. S. 145, 168–69, are so different from those now before us that the Court's action in that case can afford no support for what is here done. In affirming the conviction the Court had not noticed that the sentence imposed after trial was imprisonment at hard labor, whereas the applicable statute authorized only sentence to ordinary imprisonment. It had not been called to the Court's attention, and it was not the kind of error that the Court would notice. But the error, which everybody had overlooked, would, if uncorrected, have subjected a defendant to punishment far more severe than any authorized by Congress. In the case before us the error, such as it may be, goes to a procedural point not bearing on the fairness of the trial, or the conviction, or the sentence. And the result of this Court's action as to this procedural point is to vitiate the entire proceeding, not merely to remand for formal resentencing as in the *Reynolds* case. Also, in the *Reynolds* case the Court noted the error when indicated to it in a petition for rehearing at the same term of Court. It had not previously been indicated to any court and evidently had not previously been noted by anyone. It did not, as here, make its way to the surface after it had been duly and vigorously urged, had been assigned as [redacted] dropped, buried for three years, only to be resurrected as [redacted] and a makeweight to argument on the merits. Ag[redacted] *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16, the District Court sought to punish for contempt action which was specifically exempt from such punishment. Error of a "fundamental nature" was apparently noticed and pressed by the defendants for the first time when the case came to [redacted] Court. And the Court considered the point while the case was bef[redacted] not, as here, when it reappears as tail to another issue three years after the record containing the alleged error first came before us.

The Court orders dismissal of an indictment because of a past practice pursued in good faith under misapprehension of relevant law: But that misconception has been corrected and the proper practice has been enforced since 1944. The Court's order cannot serve as a means of ensuring a change in federal practice when that change has already taken place.

Dismissal of this indictment will not put an end to prosecution for the offenses which it charges. And so it cannot in any event relieve the Court from the duty of deciding the central issue before us, namely, whether the mails may be used to obtain money by fraud when the fraud consists of a false claim of belief touching religion. Dismissal of this indictment does not terminate prosecution for these offenses because Congress by the Act of May 10, 1934 (48 Stat. 772, amended, July 10, 1940, 54 Stat. 747, 18 U. S. C. § 587) has expressly saved this prosecution. By that Act, Congress allowed reindictment where an indictment was found defective but the basis of the prosecution is left untouched. As amended it provides that

> "whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned not later than the end of the next succeeding regular term of such court, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session."

Considering the history of this litigation, the reasonable assumption is that the Government will press this prosecution.

A conviction was had. The Circuit Court of Appeals reversed and ordered a new trial. On petition of the Government we brought the case here. The Government urged that the judgment of conviction be restored, while the defendants challenged its very foundation by invoking the constitutional guaranty of freedom of religion. In April 1944, we reversed the Circuit Court of Appeals and

found that the district court had properly "withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents." 322 U. S. at 88. But the case was remanded to the Circuit Court of Appeals without considering the question whether the First Amendment affords immunity from criminal prosecution for the procurement of money by false statements as to one's religious experiences. Three Justices concluded that the verdict should stand, and, in an opinion by the late Chief Justice, denied that the First Amendment afforded immunity for fraudulent use of the mails simply because the false statements concerned religious beliefs. A fourth Justice likewise thought this issue had to be met. He concluded that the indictment should be dismissed because it raised issues inextricably bound up with traditional liberty and could not be sustained in view of the First Amendment. Upon remand the Circuit Court of Appeals, after considering the issues which impliedly were remitted to it by this Court, found no flaw in the jury's verdict and affirmed the conviction. After three years the case is again here, and the main issue urged, both in argument and in the extensive briefs, is the power of the Government to maintain this prosecution in view of the First Amendment. A decision by this Court merely directing the dismissal of the indictment because of error in the selection of the grand jury which found it will inevitably lead to curing of this defect by resubmission to a properly selected grand jury. It can hardly be believed that the Government will not feel under duty to do so. The whole machinery of criminal justice will again be set in motion. A trial will follow, and the District Court will naturally deem itself bound to entertain the prosecution in view of the decision of its Circuit Court of Appeals, twice left undisturbed here, which rejected the claim based on religious liberty.

It is too much like playing with justice to await a third review, two or three years hence, before facing this issue

explicitly. The doctrine that a constitutional claim should not be prematurely considered is a vital feature in the harmonious functioning of our scheme of government. But it is a rule founded in reason, not a mechanical formula for avoiding an aspect of a litigation which cannot be fairly decided without meeting the constitutional issue. If this controversy could really be disposed of merely by finding that the grand jury was improperly selected, abstention from a constitutional adjudication would be imperative. Such would be the case if further prosecution were barred by the statute of limitations. But the Act of 1934, as we have seen, removes the bar and sanctions a reindictment, which is to be anticipated in view of the circumstances of this litigation. We cannot escape our responsibility by dealing merely with the remediable invalidity of the indictment, leaving untouched the decision of the Circuit Court of Appeals that the prosecution is valid. Of course the defendants might be acquitted at a new trial. But a court which purports to exercise supervisory authority in the interests of the administration of criminal justice ought not to permit the waste and unfairness involved in a new trial if there is no foundation for it. Especially is this a claim on the proper administration of justice in a case which has been in the courts for almost six years, and which is now starting on a new round as a result of the Court's decision.

In short, the prosecution will continue unless we terminate it. We can terminate it only if this Court should deem beyond constitutional authority a prosecution of the charges upon which the jury found the defendants guilty and which the Circuit Court of Appeals sustained. We ought not to give implied sanction to the continuance of this prosecution, if we do not mean to do so, by withholding our view on an issue inescapable in the full disposition of the controversy before the Court. Candor repels it and the requirements of constitutional adjudication do not justify it.

SUPREME COURT OF THE UNITED STATES

No. 37.—October Term, 1946.

Edna W. Ballard and Donald Ballard, Petitioners, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1946.]

Mr. Justice Burton, dissenting.

Although I concur in this Court's policy of requiring the inclusion in federal jury lists in California of women qualified for service as jurors of the highest court of law in that State, I believe that we are not justified in dismissing the indictment returned in this case in 1941 merely because women were not included in such lists at that time. In the absence of a binding statutory or court rule then requiring such inclusion of women the District Court was compelled to exercise its own discretion in including or excluding them. Without depending on the breadth of the discretion which should be allowed to a District Court under those circumstances, I submit that the reasons for the District Court action strengthen the position that this Court should not now retroactively disapprove the established local federal practice which conformed almost exactly with the established state practice.

Ever since its first Judicature Act Congress has subordinated federal practice to state law in determining the qualifications of federal jurors. In that Act it said: "the jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law of such State, . . ." Section 29, Act of September 24, 1789, 1 Stat. 73, 88. Similarly, the present law reads: "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States

are summoned." Section 275, Judicial Code, 36 Stat. 1087, 1164, 28 U. S. C. § 411.

There is no constitutional, statutory or court rule or policy requiring women to be placed on all federal jury lists. Congress might have required such a course and might have set up complete federal qualifications for federal jurors, but it never has done so. Instead, it has provided that state action shall determine most of the qualifications for federal jury service. As a result, it would be reversible error for the federal courts to include women on federal juries in those states which do not make women eligible for service as jurors of the highest court of law in such states. Cf. *Crowley* v. *United States*, 194 U. S. 461. This is an inescapable recognition by Congress that it sees nothing seriously prejudicial in the continued use of exclusively male federal juries in states where women are not eligible for state jury duty. The availability of appropriate accommodations for the two sexes has been treated as a material factor in determining whether women and men shall be called for jury duty. Acts and Resolves of R. I. (1939), c. 700, § 37; *People* v. *Shannon*, 203 Cal. 139, 263 P. 522. See Report to the Judicial Conference of the Committee on the Selection of Jurors (1942), 23. Subordination of the need for women on federal juries to the availability of physical accommodations for them is a tacit recognition that no fundamental infraction of the rights of litigants is involved in the continuance of exclusively male juries.

The federal courts, therefore, are bound by state definitions of jurors' qualifications subject to federal constitutional and statutory limitations. It has been argued that the Fifth and Sixth Amendments to the Constitution guarantee the continuance of the exclusively male common law federal juries, but it is now generally agreed that women are qualified to serve on federal juries wherever the states have declared them qualified as jurors of the highest court of law in their respective states. See *United States* v. *Wood*, 299 U. S. 123, 145; *Tynan* v. *United States*, 297 F. 177, 178–179, cert. denied, 266 U. S. 604; *Hozie* v. *United States*, 15 F. 2d 762, cert. denied, 273 U. S. 755.

In some employments, women are distinguished from men, as a matter of law, in connection with their hours and conditions of work. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. These distinctions are due to considerations not applicable to jury service. The general and increasing absence of sound reasons for distinctions between men and women in matters of suffrage, office holding, education, economic status, civil liberties, church membership, cultural activities, and even war service, emphasizes the lack of reason for making a point of the presence or absence of either sex, as such, on either grand or petit juries. See Miller, *The Woman Juror* (1922), 2 Ore. L. Rev. 30, 40.

By a general practice of not calling women for jury duty although eligible for such duty, the state courts of California, in effect, have granted women a substantial exemption from that duty. *People* v. *Parman*, 14 Cal. 2d 17, 92 P. 2d 387; *People* v. *Shannon*, *supra*. See *United States* v. *Ballard*, 35 F. Supp. 105, 107. The California courts thus have treated men and women as equally qualified and have assumed that litigants will have an adequate impartial jury, regardless of the sex of the jurors, provided the jurors otherwise are qualified to serve. Cf. *Hyde* v. *United States*, 225 U. S. 347, 374; *Agnew* v. *United States*, 165 U. S. 36, 44. While such a state practice is not binding upon the federal courts as a matter of law, yet it is persuasive as indicating that litigants need not be treated as having been prejudiced when a Federal District Court has conformed its practice to that of the state. For the state rule see *People* v. *Parman*, *supra*; *In re Mana*, 178 Cal. 213, 172 P. 986; *People* v. *Manuel*, 41 Cal. App. 153, 182 P. 306.

The error in the federal practice cannot be the exclusion of women, as such, because such exclusion not only is permitted but is required by federal statute in states where they are not eligible for state jury duty. The error, if any, must consist of the *failure to require the listing of*

women, as well as men, for all federal jury service *in a state which permits* such listing for state jury service, even though the state regards such listing as directory to and not mandatory upon the state courts.

There are ample grounds for distinguishing *Thiel* v. *Southern Pacific Co.*, 328 U. S. —, from this case. For

"For example, in the Thiel case, the Court acted in the absence of actual notice that the objectionable practice had been discontinued, whereas, here, we have notice that the practice objected to was changed more than two years ago to conform, at least substantially, to the approved practice."

representative character of the jury list, in a manner contrary to the tradition and purpose of the jury system. Here the exclusion of women, as such, from jury service not only was in accordance with the traditional practice, but is in accordance with the congressionally approved future practice in the federal and state courts of about 40% of the states. This shows that the only objectionable practice here was that, after the State had established a directory system of eligibility of women for state jury service, the federal court did not at once enlarge that policy into a mandatory requirement that all qualified women be placed upon all federal jury lists.

For these reasons, I am unable to concur in the judgment setting aside the indictment and verdict. The convictions in this case should be affirmed, and I concur in the statement by Mr. Chief Justice Stone: "Certainly none of respondents' constitutional rights are violated if they are prosecuted for the fraudulent procurement of money by false representations as to their beliefs, religious or otherwise." *United States* v. *Ballard*, 322 U. S. 78, 90.

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"It now appears, however, that, beginning in 1943, the practice objected to in the Thiel case has been discontinued. Louis E. Goodman, U. S. District Judge, N.D., Calif., Federal Jury Selections as Affected by Thiel v. Southern Pacific Company, 21 Journal of the State Bar of California, 352, 357."